BENJAMIN LIM KEONG HOE & ANOR v. INFOLINE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WAN AHMAD FARID WAN SALLEH JC
[SUIT NO: WA-22NCVC-389-07-2015]
29 OCTOBER 2018

CIVIL PROCEDURE: *Mode of filing – Re-litigation – Application dismissed with liberty to file afresh – Re-litigation of order of court – Applicant sent letter to court for re-consideration of dismissal of application – Whether order in enclosure for application sealed – Whether applicant ought to file fresh notice of application*

COMPANY LAW: *Receiver and manager – Application – Appointment of receiver and manager where trust still subsisting – Whether all requirements for appointment of receiver and manager met – Whether there was evidence of mismanagement or threat to property of company to justify appointment of receiver and manager – Whether application ought to be allowed – Rules of Court 2012, O. 30 – Courts of Judicature Act 1964, s. 25(2)*

The plaintiffs filed the present suit on the premise that they were the beneficiaries of a trust known as the 'Tee Keong Family Trust' ('TKFT') and to seek a declaration as such. The defendant was the trustee of the TKFT. The plaintiffs filed encl. 19, pursuant to O. 30 of the Rules of Court 2012 read together with s. 25(2) of the Courts of Judicature Act 1964, to appoint one Dato' Adam Primus Verghese Abdullah ('Dato' Adam') as the receiver and manager over the entire management of the assets of the TKFT. The plaintiffs contended that the defendant was purportedly in breach of trust in transferring the stake in four local companies. Hence, the plaintiffs wanted a receiver and manager to be appointed. Enclosure 19 was dismissed, with liberty to file afresh the application, on the grounds that (i) the affidavit in support of the first plaintiff did not exhibit the proposed receiver's curriculum vitae as well as his consent; and (ii) an affidavit of fitness of the proposed receiver was not filed. Subsequent to the dismissal of encl. 19, Dato' Adam filed an affidavit, indicating his consent to act as the receiver and manager over the management of the assets of the TKFT. This was followed by a letter, from the plaintiffs to the court, seeking the court to re-consider Dato's Adam's fitness to be the receiver and manager. In its affidavit objecting the filing of Dato' Adam's affidavit, the defendant argued that (i) in view of the dismissal of encl. 19, the plaintiffs should have filed a fresh application in seeking the reliefs stated in the same; and (ii) it was not sufficient for the plaintiffs to only send a letter to the court, seeking the case management date to be fixed.

Held (dismissing application in encl. 19):

(1) A party could not re-litigate an order of the court the moment the said order has been sealed. Since the order made in encl. 19 had not been sealed, the plaintiffs were at liberty to pursue the matter in the manner that they did although a fresh notice of application would have been more preferable. However, while Dato' Adam's affidavit indicated his consent and explained his experience and qualification, there was no independent affidavit of fitness from a third party filed by the plaintiffs. In the absence of the said affidavit of fitness, for an application of this magnitude where the assets of a trust were at stake, the court could not indulge in surmise or conjecture in the determination of it. (paras 10, 13 & 14)

(2) The appointment of the receiver and manager would have the effect of suspending the role of the defendant as the trustee to the TKFT. Consequently, the proposed receiver and manager would have to operate the entire management of the TKFT without the benefit of having the trust documents itself since the accessibility of the trust documents was now subject to vigorous challenge which decision of this court was still pending. To allow the appointment of a receiver and manager at this stage would be tantamount to letting loose a traveller navigating in an uncharted territory in a dark, starless night. No matter how experience the traveller is, he could easily go astray. (para 31)

(3) The plaintiffs were moving the court for the appointment of the receiver and manager in a situation where a trust was still subsisting. The plaintiffs' case was anchored on a few assumptions. While the movements of the shares in respect of the four local companies were not seriously challenged by the defendant, the defendant maintained that they were transferred to the rightful beneficiary of the TKFT and any subsequent dealings by the said rightful beneficiary pertaining to those shares did not involve the defendant. To conclude, at this stage, that the properties of the TKFT would be in jeopardy, would be highly speculative. (paras 28-30)

Case(s) referred to:

Gartside and Another v. Inland Revenue Commissioners [1967] QBD 121 HL ***(refd)***

Marcel Jude M S Joseph v. Chok Brother Sdn Bhd [2010] 1 LNS 1710 HC ***(refd)***

Re Church Press Ltd [1917] WN 39 ***(refd)***

Saling Lau Bee Chiang & Ors v. Kanawagi Seperumaniam & Ors [2010] 8 CLJ 347 HC ***(refd)***

Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Rules of Court 2012, O. 30

For the plaintiff - Mohd Izral Khairy, Zack Lim, Carmen Jeow PDK & Amiza Murad PDK; M/s Izral Partnership
For the defendant - Nicole Wee & Ling Li Ching; M/s Chooi & Company, Cheang & Ariff

Reported by Najib Tamby

JUDGMENT

Wan Ahmad Farid Wan Salleh JC:

[1] The plaintiffs filed this suit on the premise that they are the beneficiaries of a trust known as the Tee Keong Family Trust ("TK Family Trust") and seek for a declaration as such. The defendant, Infoline Sdn Bhd is the trustee of the TK Family Trust.

[2] The application before me which is in encl. 19, is filed by the plaintiffs for this court to appoint one Adam Primus Verghese bin Abdullah ("Dato' Adam") as the receiver and manager over the entire management of the assets of the TK Family Trust.

[3] The application is made under O. 30 of the Rules of Court 2012 ("ROC") read together with s. 25(2) of the Courts of Judicature Act 1964.

[4] On 26 February 2018, I had dismissed the application on the grounds that:

(a) The affidavit in support of the first plaintiff dated 30 August 2017 ("AIS") did not exhibit to the court the proposed receiver's curriculum vitae as well as his consent.

(b) An affidavit of fitness of the proposed receiver was also not filed. I found support for the aforesaid proposition from the judgment of Stephen Chung JC (as he then was) in the case of *Marcel Jude M S Joseph v. Chok Brother Sdn. Bhd* [2010] 1 LNS 1710; [2010] MLJU 1456. The learned judge in his judgment made reference to *Re Church Press Ltd* [1917] WN 39.

[5] For the avoidance of any doubt, since the dismissal was not based on merits, I made a further order that the plaintiffs were at liberty to file the application afresh. I said in my judgment as follows:

> For the avoidance of any doubt, since the dismissal is not based on merits, I am making a further order that the plaintiffs are at liberty to file the application afresh.
>
> I, however, order that the plaintiffs do pay the defendant a nominal costs of RM1,000 subject to allocatur.

[6] Subsequent to the dismissal of the application, Dato' Adam filed an affidavit dated 23 March 2018 ("Adam's affidavit") indicating his consent to act as the receiver and manager over the management of asset of TK Family Trust. Para 6 of the said affidavit, which is in encl. 69, states as follows:

> [6] Further to the above, I wish to state that I have given my consent to act as Receiver and Manager over the management and assets of the "Tee Keong Family Trust' ("TKFT") and/or the Defendant Infoline Sdn Bhd in order to manage TKFT.

[7] In response thereto, the defendant through its director, Yap Chong Chew ("Yap"), filed an affidavit dated 20 April 2018 ("Yap's affidavit") which is in encl. 73. The defendant, in essence, mounted a technical objection to the filing of Adam's affidavit. It is the defendant's position that in view of the dismissal of encl. 19, the plaintiffs should have filed a fresh application in seeking the reliefs stated in the same. According to Yap, it is not sufficient for the plaintiffs to only send a letter to the court and sought for a case management date to be fixed.

[8] In para. 9 of Yap's affidavit, he affirmed *inter alia* as follows:

> I have been advised by my solicitors and verily state that there was no notice of application filed by the plaintiffs applying for the appointment of a receiver and manager, other than a letter attaching the said affidavit affirmed by Adam Primus Varghese Bin Abdullah which was affirmed on 23 March 2018.

[9] The letter dated 26 March 2018 from the solicitors for the plaintiffs to the court states as follows:

> Oleh hal demikian dan berkenaan dengan Keputusan tersebut, masih belum dimeteraikan, kami dengan rendah diri memohon agar Mahkamah Yang Mulia ini boleh mempertimbangkan semula Keputusan tersebut dan khas bagi tujuan ini, kami telah melampirkan di sini sesalinan Afidavit Plaintif-Plaintif (No. 9) yang diikrarkan oleh Adam Primus Varghese Abdullah pada 23.3.2018 bagi menunjukkan beliau dan kesesuaian beliau sebagai seorang Penerima dan Pengurus.

[10] I think there are merits in the aforesaid line of arguments. The Federal Court in the recent case of *Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd* [2018] 6 CLJ 271 FC held that a party could not relitigate an order of the court the moment the said order was sealed. Since the order that I made on 26 February 2018 has not been sealed, it is in my opinion that the plaintiffs are at liberty to pursue the matter in the manner that they did, although a fresh notice of application would have been more preferable.

[11] In my grounds of judgment on 26 February 2018, I made it very clear that in an application of this nature, the plaintiffs must have complied with the following requirements as can be distilled from *Marcel Jude* and *Re Church Press Ltd.* They are these:

(a) the plaintiffs must exhibit to the court the proposed receiver's curriculum vitae;

(b) The consent of the proposed receiver must also be exhibited;

(c) An affidavit of fitness of the proposed receiver should also be filed by a deponent who has at least five years' knowledge of the proposed receiver; and

(d) If there are misleading statements in the affidavit of fitness the receiver will be discharged.

[12] In *Re Church Press Ltd*, the deponent purportedly knew the proposed receiver, S, for the past five years and affirmed that S was an accountant who had carried on business as such for upwards of five years in the City of London and that S was "a person of respectability and a fit and proper person to be appointed receiver and manager of defendants' property and assets". However, it turned out later that S was never in practice as an accountant.

[13] Applying the law to the instant application, while the plaintiffs filed Adam's affidavit indicating his consent and explaining his experience and qualification, there was no independent affidavit of fitness from a third party filed by the plaintiffs.

[14] In the absence of the aforesaid affidavit of fitness, I do not think that for an application of this magnitude, where the assets of a trust are at stake, this court can indulge in surmise or conjecture in the determination thereof.

[15] However, on the assumption that I am wrong in my aforesaid finding and for the sake of completeness, I will however briefly discuss the merits of the application.

[16] I do not think that there is any dispute that the shares in the impugned local companies namely Applewood Sdn Bhd ("Applewood"), Tooronga Sdn Bhd ("Tooronga") Beaumaris Sdn Bhd ("Beaumaris") and Datacorp Sdn Bhd ("Datacorp") (collectively referred to as "the four local companies") were, at one point or the other, part of the trust assets belonging to TK Family Trust. The plaintiffs took pains to explain the movement of shares of the said local companies, which according to the plaintiffs, culminated in either the defendant, Lim Chee Wah ("Chee Wah") or Lim Kok Thay ("Kok Thay") having either substantial or complete control of the same.

[17] Chee Wah, who is also the director of the defendant herein, and Kok Thay are the uncles of the plaintiffs.

[18] According to the plaintiffs, the control of the four local companies can be summarised as follows:

(a) Beaumaris is said to be under the full control of Chee Wah either directly or through one Ridgefield Sdn Bhd ("Ridgefield"). It is the plaintiffs' case that Ridgefield is the trustee of Chee Wah's Trust;

(b) Applewood is said to be under the control of Ridgefield;

(c) Tooronga is said to be under the control of Chee Wah and Ridgefield as at 30 April 2015; and

(d) The real controller of Datacorp was the late Puan Sri Lee Kim Hua @ Lee Ah Sang ("Puan Sri Lee"), who was the grandmother of the plaintiffs and the wife of the late Tan Sri Lim Goh Tong (and hence the mother of Chee Wah and Kok Thay). Since both Chee Wah and Kok Thay are the attorneys to Puan Sri Lee by virtue of a power of attorney (general) dated 9 November 2012 ("the disputed general PA"), the plaintiffs argued that the real controllers of Datacorp are now Kok Thay and Chee Wah.

The Law

[19] In the course of his submission, learned counsel for the plaintiffs referred me to the case of *Saling Lau Bee Chiang & Ors v. Kanawagi Seperumaniam & Ors* [2010] 8 CLJ 347. In *Saling Lau*, Vernon Ong JC (now JCA) held as follows:

> The court's power to appoint interim Receiver and Manager (R&M) to preserve property pending determination of a suit is provided under s. 25(2) of the Courts of Judicature Act 1964 (item 6 of the Schedule), s. 43 of the Specific Relief Act 1950 and under O. 30 r. 1 and O. 29 r. 2 of the Rules of the High Court 1980 (see also *Cummins v. Perkins* [1899] 1 Ch D 16 at 20 per Lindley MR). The test for the appointment of a R&M is well established (*Matang Holdings Bhd v. Dato Lee San Choon & Ors* [1985] 1 LNS 42; *Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng* [1947] 1 LNS 98; *Lim Poh Choo v. Absolute Ascend Sdn Bhd* [2008] 7 CLJ 810; *Federal Transport Service Co. Ltd & Ors v. Abdul Malik & Ors* [1973] 1 LNS 28). The applicant must satisfy the court that:
>
> (i) there is a good *prima facie* claim of title by the plaintiffs; and
>
> (ii) the property is in jeopardy or the plaintiffs would be in a worse off position if appointment of a receiver is delayed.

[20] The facts in *Saling Lau* can be summarised as follows. The plaintiffs applied for the appointment of a receiver and manager (R&M) to receive and manage the assets of the Linggiu Valley Orang Asli Trust and the sums awarded under a High Court judgment. They also applied for an injunction to restrain the defendants from dissipating the trust assets and the judgment sum. The defendants, on the other hand, applied to set aside the R&M order and the injunction order that was obtained *ex parte* and also for a stay of the

said orders. The court held that the trust property was in jeopardy and that the beneficiaries would be in a worse off position because the defendants were in breach of the express order of court dated 5 June 2000 requiring the appointment of the Director General of Jabatan Hal Ehwal Orang Asli as a trustee. The defendant was also in breach of another court order dated 4 April 2006 requiring the defendants to produce certified accounts as required by the trust deed in that the first and second defendants only managed to produce unaudited/uncertified statements.

[21] Learned counsel then cited the House of Lords case of *Gartside and Another v. Inland Revenue Commissioners* [1967] QBD 121 HL where it was held that a person who has a right, *albeit* contingent, to some benefit from a trust fund in some future event, has a present right to prevent the trustees from dissipating the fund. The plaintiffs' contention in the instant case is that although they were purportedly removed from being the beneficiaries of the TK Family Trust by the defendant, they retain the right to pursue the application to appoint the receiver and manager. This is so in the event that in the future, this court so decides that such removals were null and void.

[22] For the reason aforesaid, I am inclined to agree with learned counsel for the plaintiffs that the plaintiffs have satisfied the court that they have a good *prima facie* claim under the TK Family Trust irrespective of their purported removal as beneficiaries and I so hold.

The Analysis: Are The Properties In Jeopardy?

[23] The gist of the plaintiffs' contention is that the defendant was purportedly in breach of trust in transferring the stake in the four local companies to either Ridgefield or Chee Wah or to the late Puan Sri Lee where Chee Wah and Kok Thay were the attorneys of the general PA of Puan Sri Lee. Hence, they want a receiver and manager to be appointed over the entire management of the assets of TK Family Trust and or the defendant for the purpose of managing the family trust.

[24] It should be borne in mind that in *Saling Lau* the defendants were in direct breach of two court orders rendering them unfit to continue to serve as trustees, at least for the interim period. There was no such breach in the instant case.

[25] In *Setapak Tin Syndicate Ltd* there were several allegations that the impugned mine was in an abandoned condition and that looting had taken place. Those allegations were refuted by the defendant. Willan CJ held that on the facts before the court, he was unable to find it proved that the property was in jeopardy.

[26] In *Lim Poh Choo* Ramly Ali J (as the FCJ then was) made it clear that the appointment of receiver and manager will be made by the courts where there is some legal or equitable right that ought to be protected and there is no other available remedy adequate for that purpose.

[27] In *Federal Transport Service* the Chang Min Tat J (as he then was) held that where there were serious disputes among shareholders of a company and where the assets of the company were in jeopardy the only way to save the company and to ensure its continued operations would be to appoint a receiver as well as a manager. The appointment was however limited until the affairs of the company were sorted out and until it was ascertained who were the duly constituted directors. The court so held with the hope that "the spate of litigation that is at present bedevilling the fortunes of this company will be abated".

[28] It cannot be gainsaid that the appointment of a receiver and manager is a harsh remedy afforded by O. 30 of ROC. As in any other discretion, the court must exercise such discretion judicially. In the instant case, the plaintiffs are moving this court for the appointment of the receiver and manager in a situation where a trust is still subsisting. There is no doubt that the plaintiffs' case is anchored on a few assumptions. First is that they were wrongfully removed as beneficiaries from the TK Family Trust. Secondly, the general PA of Puan Sri Lee was wrongfully procured by Chee Wah and Kok Thay. Thirdly, the movements of the shares on the four local companies were in breach of the terms and conditions of the TK Family Trust.

[29] While I am mindful that the movements of the shares in respect of the four local companies were not seriously challenged by the defendant, the defendant maintained that they were transferred to Puan Sri Lee as the rightful beneficiary of the TK Family Trust. As indicated by Yap in his affidavit in reply dated 6 October 2017 which is in encl. 31, any subsequent dealings by Puan Sri Lee pertaining to those shares did not involve the defendant.

[30] In the circumstances, to conclude at this stage that the property of TK Family Trust would be in jeopardy would be highly speculative. In any event, taking some guidance from *Lim Poh Choo*, the plaintiffs are not deprived of any other available remedy. If at the end of the trial, this court so concludes that the plaintiffs were indeed wrongfully removed as the beneficiaries, it would be open for the plaintiffs to seek whatever available remedies for the period of such wrongful removal.

[31] The appointment of the receiver and manager would have the effect of suspending the role of the defendant as the trustee to TK Family Trust. The attendant consequences would be the proposed receiver and manager would have to operate the entire management of the TK Family Trust

without the benefit of having the trust document itself since the accessibility of the trust document is now subject to vigorous challenge which decision of this court is still pending. To allow the appointment of a receiver and manager at this stage would be tantamount to letting loose a traveler navigating aimlessly in an uncharted territory in a dark, starless night. No matter how experienced the traveler is, he could easily go astray.

[32] In the result, the application in encl. 19 is dismissed with costs in the cause.